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No. 94-695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

ALLEN-MYLAND, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT' S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether it was permissible for the court of appeals to vacate the district court's disposition of a tying case under Section 1 of the Sherman Act and to remand for *de novo* reconsideration, including possible additional discovery and evidentiary hearings on certain issues, where the court of appeals, after an exhaustive review of the record, concluded: (a) That key findings of the district court on the contours of the market for the tying product, and on the existence of a separate market for the tied product, were "clearly erroneous" under Fed. R. Civ. P. 52(a); (b) that the district court had misconstrued the established market definition principles of "cross-elasticity of demand" and "reasonable interchangeability" as applied to the facts of this case; and (c) that the district court should be allowed to consider the impact of this Court's intervening decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. ___, 112 S. Ct. 2072 (1992).

RULE 29.1 LISTING

Respondent Allen-Myland, Inc. has no parent company or non-wholly owned subsidiary.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement of the case	2
Reasons for denying the writ	15
Conclusion	24

TABLE OF AUTHORITIES

Cases: **Page**

Allen-Myland, Inc. v. International Business Mach. Corp., 746 F. Supp. 520 (E.D. Pa. 1990) 7

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 23, 24

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. __, 112 S. Ct. 2072 (1992) 12-13

Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514 (2d Cir. 1989) 19

In re IBM Peripheral EDP Devices Antitrust Litigation, 481 F. Supp. 965 (N.D. Cal. 1979), *aff'd*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983) 21

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) 18

United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) 11, 19-21

United States v. Aluminum Co. of Am., 377 U.S. 271 (1964) 22

Page

United States v. Continental Can Co., 378 U.S. 441 (1964) 22

United States v. International Business Mach. Corp., 1956 Trade Cas. (CCH) ¶ 68,245 (S.D.N.Y. 1956) 3

United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) 22

United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970) 22

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 23

Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660 (6th Cir. 1993), *cert. dismissed*, 114 S. Ct. 2700 (1994) 19

Statutes and Rules:

28 U.S.C. § 1254(1) 2

Sherman Act:
15 U.S.C. § 1 . . . . . 2, 7, 14
15 U.S.C. § 2 . . . . . 7, 19

Fed. R. Civ. P. 52(a) 22, 23

Fed. R. Civ. P. 54(b) 12-13

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Allen-Myland, Inc. respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 33 F.3d 194 (3d Cir. 1994) and is reprinted in the petitioner's Appendix at A1-A36. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 693 F. Supp. 262 (1988) and is reprinted in the petitioner's Appendix at A37-A109.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(l).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

A. *Factual Background*

This antitrust case challenges IBM's "net pricing" policy, under which IBM tied the services needed to upgrade its 308X series large-scale mainframe computers to the parts needed to perform such upgrades. IBM's policy made upgrade parts available only if the necessary reconfiguration services also were obtained from IBM at a single combined price, and further required purchasers of upgrades to surrender to IBM all parts removed from their machines at the time the upgrades were performed by IBM. Respondent AMI, a provider of the engineering services needed to upgrade IBM mainframes, was a victim of that policy, and has spent the last nine years seeking redress under the antitrust laws.

Throughout the period relevant to this appeal, 1981-1985, IBM was the industry leader in large-scale

mainframe computers. Pet. App. A2.[1] As the result of a landmark 1956 Consent Decree settling government antitrust charges against it, IBM was barred from offering its computers on a lease-only basis; it also had to offer to sell them outright.[2] The result was the emergence of third-party leasing companies, which purchased mainframes from IBM and marketed them to end users. Pet. App. A2-A3.

In order to recover their substantial investments in the equipment, leasing companies had to keep their IBM mainframes in circulation. To do so, they had to have their mainframes periodically reconfigured to meet specific end-user demands.[3] Pet. App. A3. The leasing companies' most important requirements in keeping their machines fully leased were the availability of parts and prompt reconfiguration service. *See*, *e.g.*, JA 743-44, 1259-60. When IBM failed to provide such service in a timely manner (*see*, *e.g.*, Pet. App. A3), leasing

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[1] Citations to the opinions below are to the Appendix to the Petition ("Pet. App."), and those to the record are to the Joint Appendix in the court of appeals ("JA"). IBM's petition for certiorari is cited as "Pet."

[2] *United States v. International Business Mach. Corp.*, 1956 Trade Cas. (CCH) ¶ 68,245 (S.D.N.Y. 1956). In its petition, IBM states that the court of appeals erred when it asserted that IBM is barred from leasing computers. Pet. 9 n.5. While it may have inaccurately stated the particulars of the Consent Decree in this footnote, it is apparent that the court of appeals understood its import. *See* Pet. App. A11 n.11 ("IBM's past practices of offering tabulating and computer equipment only for lease and not for sale" gave rise to the Consent Decree).

[3] In reconfiguring the processing capacity of an IBM mainframe, certain core parts are removed and replaced with more powerful (or less powerful) parts. Pet. App. A39.

companies turned to independent engineering firms such as AMI.

AMI was extremely successful in obtaining reconfiguration work on the 303X series of IBM mainframe computers, the predecessor to the 308X series. *See, e.g.*, Pet. App. A61. AMI's ability to compete successfully against IBM for 303X reconfiguration business was attributable not only to its specialized expertise and responsiveness to leasing company and end-user needs, but also to the relatively poor quality of service offered by IBM. *See, e.g.*, JA 6516. As the court below explained, "[l]essors could not afford to have their machines idle and generating no revenue while waiting for a reconfiguration, yet IBM often took months to install an upgrade. AMI, on the other hand, would turn the job around in a matter of only a few days." Pet. App. A3. Instead of improving its performance, however, IBM chose to hinder the leasing companies' ability to utilize independent reconfiguration firms like AMI by erecting a variety of "roadblocks,"[4/] one of which was IBM's net pricing policy.

[4/] As described by IBM's Director of Industry Relations, who was in charge of IBM's dealings with leasing and service companies (JA 6989):

> They [the leasing companies] bought our assets. They are upgrading it. They are moving the used equipment. They're putting IBM MES and features [*i.e.*, upgrades] on it, and we are throwing roadblock and roadblock, and roadblock in their way. Over and over again. And they think we're loosing [sic] our minds.

Under that policy, IBM sold parts for practically all "MIPS" and many "memory" upgrades[3] under "net-priced" contracts providing that installation of the new parts would be performed by IBM field engineers and requiring that valuable removed parts, which could be used by the leasing companies to reconfigure other machines in their inventories, be surrendered and become the property of IBM. Pet. App. A3-A4. The used parts were either ostensibly refurbished (made "equivalent-to-new," or "ETN") by IBM or destroyed. *See* Pet. App. A89-A90. Many of the ETN parts were then sold back as part of net-priced upgrades, at new parts prices, for use in upgrading other old machines.[4] Pet. App. A4, A89.

For upgrades of machines up through the 303X series, a purchaser seeking to avoid using IBM's engineering service and surrendering valuable parts to IBM had the option of purchasing the parts over-the-counter ("OTC") from IBM rather than in a net-priced upgrade. Beginning with the 308X, however, the OTC price was either "unavailable" or was set at a level that precluded

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[3] There are three principal types of upgrades to IBM mainframe computers: Memory upgrades, processing speed ("MIPS") upgrades (also known as "model upgrades"), and channel upgrades. Pet. App. A39. Although IBM in its petition focuses solely on MIPS upgrades, which utilized thermal conduction modules ("TCMs"), the IBM net pricing policy also extended to memory upgrades, many of which did not utilize such technology. Pet. App. A39, A76 n.60, A91.

[4] At the time of trial, some ETN parts had been recaptured and resold at "new" prices as many as three times. JA 1705-06.

it from being a viable option. Pet. App. A43 n.15.[7] With new parts either not offered for sale at all or priced at levels rendering them economically unavailable -- and with used parts similarly unavailable because IBM's net pricing policy included recapture of removed parts -- purchasers of IBM net-priced upgrades had no meaningful alternative. *See* Pet. App. A3-A4.

Not surprisingly, IBM's net pricing policy proved to be a highly effective means of foreclosing the competition posed by AMI and other third-party engineering organizations while, at the same time, imposing significant constraints upon the leasing companies' ability to market IBM mainframes.[8] Seeing its business

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[7] For more than two years after it introduced the 308X, IBM failed to establish *any* OTC price for the TCMs needed for 308X MIPS memory upgrades. Pet. App. A43 n.15. When it finally established such prices in late 1983, the prices were too high to provide users with a viable alternative to net-priced upgrades. *Id.* For example, in 1983, a 308D machine sold for $3 million and a 308K sold for $3.6 million. Pet. App. A43-A44 n.15. Although IBM charged $600,000 for the D to K net-priced upgrade, the OTC price for the parts needed for such upgrade was $4.58 million, or $980,000 more than the entire new 308K machine. *Id.*

[8] Just how effective is illustrated by comparing sales data on the 303X MIPS upgrades (for which parts were freely available) with similar data on the 308X MIPS upgrades (for which they were not). From 1981 through 1983, AMI performed nearly as many MIPS upgrades on IBM 303X machines as IBM did. *See* JA 6696-97, 7274. In contrast, on the 308X series, IBM performed more than 1,800 net-priced MIPS upgrades from 1981 through 1985. AMI was able to perform only eleven functionally equivalent MIPS upgrades during the same period. JA 7177, 7181.

(continued...)

evaporate, AMI sued IBM under Section 1 of the Sherman Act, alleging that IBM's net pricing policy constituted an unlawful tie between the parts and engineering services required to perform an upgrade.[2/]

B. *The Proceedings Below*

1. *Opinion of the District Court*

AMI's tying claims were tried without a jury in the United States District Court for the Eastern District of Pennsylvania (O'Neill, D.J.). A principal issue at trial was whether, during the relevant period (1981-1985), IBM possessed sufficient economic power in the tying product (the parts needed for upgrades) to restrain trade in the tied product (the engineering services needed to install such upgrades). Because a manufacturer's apparent power as the sole source of new parts for upgrades of its own equipment might in some

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[1/] (...continued)

Meanwhile, the net pricing policy paid off very well for IBM. IBM's revenues from the sale of net-priced 308X MIPS upgrades (including the parts necessary for such upgrades) during the 1981 to 1985 period were over $2 billion (Pet. App. A34), and its revenues from the sale of all net-priced memory upgrades in 1984 alone exceeded $70 million. Pet. App. A91 n.82.

[2/] In addition to its Section 1 claim, AMI also alleged an attempt to monopolize under Section 2 of the Sherman Act, 15 U.S.C. § 2, and various state law claims. The district court, with consent of the parties, entered judgment for IBM on the Section 2 claim on the ground that unless its ruling as to market power on the Section 1 claim was reversed, that claim could not survive. Pet. App. A5; *see Allen-Myland, Inc. v. International Business Mach. Corp.*, 746 F. Supp. 520, 525 n.1, 559 (E.D. Pa. 1990). The parties agreed to stay AMI's tortious interference claim, and AMI's unfair competition claim was dismissed. Pet. App. A38 n.1.

circumstances be negated by an absence of market power in the market for the equipment itself, a major focus at trial concerned whether IBM possessed a sufficient degree of power in the market for large-scale mainframes.

On this issue, the district court acknowledged that IBM, which accounted for approximately 70% of the industry revenues attributable to large-scale mainframes, would have "substantial economic power" if the market were defined as large-scale mainframes. Pet. App. A47. Nonetheless, the district court, relying largely on anecdotal and generalized opinion evidence offered by IBM, rejected large-scale mainframes as constituting a relevant market. Pet. App. A47-A59.[10/]

Instead, the district court found the relevant market to include a wide-ranging array of data processing products and services, including computer leasing companies; smaller, lower capacity computers; peripheral products (such as memory storage devices, input/output devices, and disk drives); computer software; box

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[10/] In contrast to IBM's anecdotal evidence, AMI's expert witness, Yale economics professor Richard C. Levin (now president of Yale) based his market definition in large part on documents generated by IBM, including a series of internal IBM reports known as "Significant Win/Loss Reports" ("SWLRs"). These reports, sent monthly to IBM's Chairman and members of its Management Committee, showed, for each individual competitive situation surveyed, the IBM product offering, the competitive product offerings, and which product the customer chose. Pet. App. A49. The SWLRs showed that in 97% of the instances in which the IBM offering was an IBM large-scale mainframe, the competing offerings were also large-scale mainframes or upgrades to them. Pet. App. A21, A49.

swaps;[11/] upgrades using customer parts; and even data processing service bureaus. *Id.* The district court found that when all of these purported substitutes were included in the relevant market, IBM's share declined so steeply from the original 70% level as to preclude a finding of market power. Pet. App. A58-A59. In addition, the district court found that non-market share evidence offered by IBM concerning entry into the data processing business, the extent of technological innovation, and IBM's own market/pricing performance also undermined AMI's contention that IBM had sufficient economic power for *per se* tying liability. Pet. App. A59-A63.

The district court also concluded that AMI had not been foreclosed from a viable business opportunity by IBM's net pricing policy. Pet. App. A68-A86. It found that the TCM technology introduced by IBM for MIPS upgrades had reduced the added value of the labor component on a MIPS upgrade to a *de minimis* amount (Pet. App. A68-A77); that the inventory expense for parts that AMI would have borne would have been so high that AMI could not have made a profit on performing MIPS upgrades, and, in fact, would have experienced significant losses (Pet. App. A77-A79); and that customers would not be willing to pay any more for upgrades from AMI than they would from IBM (Pet. App. A80-A83). Accordingly, the district court concluded that even if IBM had market power, AMI could not establish that IBM's net pricing policy was *per se* unlawful. Pet. App. A68.

11/ A "box swap" is the replacement of an existing machine by another machine with the desired characteristics.

For the same reasons, the district court ruled that AMI had also failed to show that net pricing as practiced by IBM was unlawful under the Rule of Reason. Pet. App. A90. Noting that "market power is one test of reasonableness," the court held that "[t]he availability of wide-ranging alternatives to IBM net priced upgrades . . . precludes a finding that IBM's net pricing policy has any appreciable anticompetitive effect on the market as a whole." Pet. App. A87 (footnote omitted). And in light of its "business opportunity" determination, the court further held that "AMI has also failed to establish that net pricing has an anticompetitive impact on the market for 308X upgrade labor services." *Id.* Concluding in addition that the net pricing policy was justified by "legitimate reasons," *i.e.*, "to ensure the prompt and proper return of TCMs needed to sustain the ETN program and the commercial success of the 308X line of products," and that the policy's consequent "procompetitive effects outweigh[ed] its virtually nonexistent anticompetitive impact," the court ruled that "AMI's rule of reason challenge to net pricing fails." Pet. App. A90.

2. *Opinion of the Court of Appeals*

Based upon an exhaustive review of the record, a unanimous court of appeals (Seitz, Sr. Cir. J., and Mansmann and Nygaard, Cir. JJ.) vacated the district court's judgment in favor of IBM and remanded the case for further proceedings. Specifically, the court of appeals vacated the district court's finding that IBM lacked sufficient market power to support *per se* liability and directed the district court to re-examine the issue *de novo*. Pet. App. A25. The court of appeals also found that the district court erred in concluding that AMI had not been deprived of a viable business opportunity,

and instructed the district court to re-examine that issue *de novo* as well. Pet. App. A34, A35-A36.

Market Power. The court of appeals rejected the district court's extraordinarily broad definition of the relevant market. With respect to mainframes placed by *leasing companies*, the court of appeals rejected the district court's wholesale inclusion of leasing companies in the relevant market and instead concluded that distinctions must be drawn (i) between IBM-manufactured mainframes and those manufactured by other companies, and (ii) between new and used machines. Pet. App. A8-A12.

Including *new* mainframes, the court of appeals concluded, would result in double counting (Pet. App. A9-A10), while inclusion of leased, *used*-IBM mainframes would be erroneous under the "control" principle articulated in *United States v. Aluminum Co. of America*, 148 F.2d 416, 425 (2d Cir. 1945) ("*Alcoa*"), as applied to the facts of this case. As the court of appeals observed, IBM was able to control the number of machines available to leasing companies, and that "control was enhanced by IBM's policy of recapturing old parts that could otherwise have been used to extend the useful service lives of existing used mainframes by allowing them to be upgraded and placed with new customers."[12/] Pet. App. A11. IBM's delay in

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12/ By recapturing important used parts which the leasing companies could use for reconfigurations and then repricing them as "new" (Pet. App. A89), IBM significantly raised leasing company costs.

providing upgrades constituted an additional form of control.[13/]

Employing similar reasoning, the court also concluded that neither *box swaps* nor *used parts upgrades* were properly includable in the relevant market. Pet. App. A12-A13. The court of appeals concluded, however, that used, *non-IBM* machines, when placed in service by leasing companies, were not controlled by IBM and did provide a competitive alternative that limited IBM's market power and hence were properly included in the relevant market. Pet. App. A11-A12.

The court of appeals further concluded that there was insufficient evidence to support the district court's wholesale inclusion of *peripheral devices and software* in the relevant market. Pet. App. A19. It also left to the district court's discretion whether to revisit its decision on the inclusion of *smaller capacity computers* in the market in light of this Court's intervening decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. __, 112 S. Ct. 2072 (1992). Pet. App. A14-A16.[14/]

[13/] By delaying the availability of upgrades, IBM imposed further additional costs as IBM mainframes requiring such upgrades sat idle in leasing companies' inventories. *See* Pet. App. A3.

[14/] The district court issued its opinion in this case on July 21, 1988, but did not certify the judgment as appealable pursuant to Rule 54(b) until May 14, 1993. This Court issued its opinion in *Kodak* on June 8, 1992. The court of appeals found that there was evidence to support the district court's finding that, in at least one circumstance, a smaller-scale computer could be a substitute for a large-scale mainframe. Pet. (continued...)

The court of appeals also rejected the district court's findings on non-market share indicia of IBM's purported lack of market power. With respect to the IBM-proffered evidence regarding absence of entry barriers, the court of appeals ruled that the district court had erred by equating new entry with what is properly includable in the relevant market in the first instance, and that the entry of leasing companies and reconfiguration service companies such as AMI did not constitute evidence of entry at the manufacturing level. Pet. App. A22-A24. With respect to the district court's findings on technological innovation and market performance, the court of appeals held that there was no evidence to support the proposition that technological innovation in the computer industry, and/or declining prices for computer equipment generally, were related to any decrease in IBM's market power, and that the district court had therefore erred in deeming innovation and price reductions to preclude a finding that IBM possessed market power. Pet. App. A25.

Viable Business Opportunity. The court of appeals also vacated the district court's determination with respect to the lack of a viable business opportunity. It

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[14] (...continued)
App. A14. The court of appeals observed, however, that the trial court had not considered whether owners of expensive large-scale mainframes could be "locked-in" to their systems due to the prohibitive expense of "porting" their applications from a mainframe to a smaller computer. Pet. App. A14. The court of appeals did not attempt to resolve the lock-in issue, but instead left it to the district court on remand to decide whether to examine the issue in light of *Kodak*, including whether "to permit further discovery on the issue, and to hear additional evidence." Pet. App. A16.

"interpret[ed] the district court as holding that AMI failed to prove the following two prongs of the orthodox framework for a section 1 tying case: first, that two separate markets existed for the tying and tied products; [and] second, that a substantial volume of interstate commerce was affected by the tie." Pet. App. A26. The court of appeals also noted that the district court's analysis of a viable business opportunity "appear[ed] to bear on the 'fact of damage' issue of whether AMI has standing to bring a private antitrust suit against IBM." *Id.*

With respect to the first issue (the existence of two separate markets), the court of appeals concluded that the evidence relied on by the district court failed to support its findings that: (i) Customers would not be willing to pay more for AMI services than those provided by IBM; (ii) there was no significant demand for third party installation services; (iii) AMI would suffer massive losses from inventory costs; and (iv) the value of the labor content of a 308X MIPS upgrade was *de minimis*. Pet. App. A27-A34. The court of appeals therefore concluded that the district court's refusal to recognize a separate market for installation of upgrades could not stand, and remanded for further proceedings. Pet. App. A34.

The court of appeals likewise rejected the district court's ruling that a not insubstantial amount of commerce had been foreclosed, noting the district court's acknowledgement "that the $20 million market [IBM's assigned value of the engineering services] for upgrade installations was quantitatively more than sufficient." Pet. App. A35.

Finally, the court of appeals addressed the "fact of damage" issue. Observing that the district court, while declining to rule on the issue, had noted that its analysis of the business opportunity issue "seemed to preclude any finding that AMI suffered the requisite damage," the court of appeals also remanded the "fact of damage" issue to the district court for reconsideration. Pet. App. A36.

REASONS FOR DENYING THE WRIT

I.

IBM suggests that the "necessary implication" of the decision below is that "procompetitive justifications" for a tie "must be ignored" if the defendant is found to possess market power triggering the so-called *per se* rule applicable to some tying arrangements, and that this "implication" conflicts with rulings in other circuits permitting antitrust defendants to demonstrate a business justification for an otherwise *per se* illegal tying arrangement. Pet. 15-18. Although the court of appeals made no ruling, and indeed offered no opinion whatsoever, on the significance of the "procompetitive justification" asserted by IBM in this case,[15] IBM

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[15] The court did note, however, the *anti*-competitive impact of IBM's recapture policy and the net pricing requirement that ensured its success (Pet. App. A11 n.11):

> By recapturing old parts from upgraded mainframes, IBM effectively curtailed the leasing companies' ability to reconfigure their used machines into different models that could have competed against IBM's offerings over the medium term. This effect is similar to that caused by IBM's past practices of offering tabulating and computer equipment only for lease and not for sale.

nevertheless insists that the remand necessarily *implies* a Third Circuit holding on the business justification issue, which it now invites this Court to address. Pet. 14.

The "procompetitive justification" asserted by IBM was that its net pricing policy "facilitated the development and marketing of TCM technology" and "allowed IBM properly to recover its investment in the technology." Pet. 8-9, Pet. App. A90. It did so, according to IBM, by "insur[ing] that the old TCMs recovered from reconfigured machines were returned to IBM [for] refurbish[ing] to 'equivalent to new' condition," thus averting a "manufacturing capacity shortage" allegedly faced by IBM. Pet. App. A4. IBM's ability to "ensure that it got its TCMs back . . . was enhanced," IBM argued, "when IBM personnel performed the labor." *Id.*

In exonerating net pricing as "procompetitive" under the Rule of Reason, the district court accepted this rationale, although not without qualms. Pet. App. A91.[16/] IBM argues that this Rule of Reason holding was not appealed by AMI and therefore must be deemed "undisputed" (Pet. 11), from which IBM indignantly infers that the court of appeals, in supposed conflict with

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[16/] As the district court noted, "[t]he fact that IBM applies net pricing to numerous 308X memory upgrades that do not require the return of TCMs . . . is inconsistent with IBM's principal stated justification for net pricing and therefore raises doubts about IBM's motives . . . ." Pet. App. A91 (citations omitted). IBM's own expert economist, Prof. William Baumol, when asked whether his opinion that the net pricing policy was not anticompetitive would change if the policy were applied to non-TCM technology, testified that, had he known that to be true, he "might very well had [sic] been on the other side." JA 2350-51.

other circuits, held procompetitive justifications to be irrelevant when market power is shown.

Preliminarily, we note that on the merits of the alleged issue, IBM now takes precisely the opposite of its position in the court of appeals. There, IBM castigated AMI for even "discussing the origin of net pricing for 308X upgrades," on the ground that this was "irrelevant to the issues presented on appeal" in that, according to IBM, "a *per se* tying claim does *not* involve any examination of the intent underlying, or the business justifications for, the challenged practice." Brief for Appellee at 3 (emphasis added); *see also id.* at 17.[17/] To whatever extent the court of appeals' opinion may be deemed to "imply" that business justifications cannot be considered in a *per se* tying case, the "implication" merely echoes IBM's own representations to the court.

More importantly, the inter-circuit conflict claimed by IBM is specious. IBM's tortured construction of the opinion below ignores what was actually before the court of appeals for review. The twin premises for the district court's Rule of Reason holding were its antecedent determinations (i) that there were "wide-ranging alternatives to IBM net priced upgrades," so that IBM lacked market power, and (ii) that there was no separate demand for, and thus no anticompetitive impact on, "the market for 308X upgrade labor services." Pet. App. A87. When these premises fell, so did the district court's rationale

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[17/] This was itself a reversal of IBM's position in the district court, where it argued that business justifications *are* relevant in applying the *per se* standard. *See* IBM Post-Trial Mem. at 38; IBM Post-Argument Mem. at 59-60.

for accepting IBM's proffered "justification" as sufficiently procompetitive. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35 (1984) (O'Connor, J., concurring) (recognizing the illegality of a tie that "abet[s] the harmful exercise of market power that the seller possesses in the tying product market").[18/]

The court of appeals clearly recognized this when it vacated the judgment for IBM on the tying count of AMI's complaint in its entirety, not just on the *per se* theory of liability. Pet. App. A2.[19/] The weight to be accorded IBM's asserted business justification, if any, is a matter for the district court to consider on remand.

The "implication" IBM discerns from the decision below thus is illusory, and the asserted conflict with

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[18/] As IBM admitted in the district court (JA 699), TCMs were reusable, reliable and durable. Without IBM's policy of recapturing used TCMs and reselling them for reuse at "new" parts prices, TCMs would have remained in the marketplace for use by leasing companies and independent reconfigurers like AMI to fabricate and install upgrades, thereby reducing the demand for TCMs supplied directly by IBM and obviating any need for it to create redundant manufacturing capacity. Thus, the only "efficiencies" flowing from IBM's tying scheme were efficiencies in maintaining IBM's own market power.

[19/] Indeed, IBM itself appears to have recognized as much, as it never argued to the court of appeals that the district court's allegedly "undisputed" finding of "procompetitive justification" made market power -- the issue to which both parties addressed the bulk of their presentations -- irrelevant. The closest IBM came to asserting the legal theory it now presses before this Court was a single paragraph in its brief, characterizing the "context" of the case as "unusual" and criticizing AMI for allegedly asking the court of appeals "to ignore" the district court's Rule of Reason holding. Brief for Appellee at 17-18.

other circuits is nonexistent.[20/] IBM raises no issue in this respect warranting review by this Court.

II.

IBM purports to find in the opinion below "an unprecedented rule of law," premised on the landmark Sherman Act Section 2 decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), to the effect that "used equipment is not, *as a matter of law*, in the same market as new equipment made by the same manufacturer defendant." Pet. 18, 24. Once again, IBM relies solely on "implication" in its search for a ruling it can challenge.[21/] And once again, the purported "implication" is nowhere to be found in the opinion.

[20/] To buttress its claim of inter-circuit conflict, IBM suggests (Pet. 15 & n.8) that the Second Circuit in *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1519 (2d Cir. 1989) and the Sixth Circuit in *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), *cert. dismissed*, 114 S. Ct. 2700 (1994), "apparently" view the business justification defense as unavailable in a *per se* tying case. As IBM itself acknowledges, however, *Virtual Maintenance* at best is "somewhat ambiguous on this point." Pet. 15 n.8. And in *Gonzalez*, the Second Circuit simply declined to adopt a requirement that the defendant have an "economic interest" in the tied product (880 F.2d at 1517) and remanded to determine whether the alleged tie had a substantial impact on interstate commerce (*id.* at 1519). But whatever the true import of those decisions, the case at bar presents no conflict with other circuits.

[21/] *See* Pet. 19-20 n.11.

Contrary to IBM, the court of appeals correctly understood *Alcoa*[22] as holding merely that, depending on the facts, a manufacturer with power to control the supply of new product *may be* in a position thereby to control the extent to which used product provides a competitive alternative to prospective buyers, in which case used product must be disregarded in identifying competitive substitutes. Pet. App. A10.[23] Far from transmuting this principle into the "rule of law" attacked by IBM, the court of appeals went on -- in language glaringly omitted by IBM from its attack on the court's analysis -- to observe:

> This is particularly true when, *as here*, that control was enhanced by IBM's policy of recapturing old parts that could otherwise have been used to extend the useful service lives of existing used mainframes by allowing them to be upgraded and placed with new customers.

Pet. App. A11 (emphasis added). As the court explained (*id.* n.11):

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[22] Significantly, IBM does not criticize the court of appeals' restatement of the *Alcoa* holding on this point. *See* Pet. 19.

[23] Indeed, in the district court IBM's own counsel acknowledged that if IBM's practices restrained leasing company competition, *Alcoa* required exclusion of leasing companies in defining the relevant market (JA 2513):

> And if it turns out that the exercise of [market] power inhibits anybody from competing with you, against you with a used version of your product, then it may not be appropriate to consider that used product competition.

> IBM's net pricing and parts recapture policies further reduced whatever control the leasing companies might have had over the prices of used equipment. By recapturing old parts from upgraded mainframes, IBM effectively curtailed the leasing companies' ability to reconfigure their used machines into different models that could have competed against IBM's offerings over the medium term.

It was explicitly on this basis that the court of appeals "conclude[d] that the district court erred when it added leases of used IBM mainframes into the relevant market." Pet. App. A11.

The court's application of the *Alcoa* principle to this case thus was based entirely on what the record showed, as a factual matter, on whether used IBM equipment imposed competitive constraints on IBM's market power over mainframe computers, not on any supposed automatic "rule."[24/] This resolution of the matter was plainly correct, and presents no issue warranting review by this Court.

[24/] This approach is fully consistent with the decisions in other circuits with which IBM asserts a "conflict" (Pet. 21-22), as well as with a decision understandably but inexcusably *not* cited by IBM, holding that although general purpose computer systems previously sold by IBM (its "installed base") should not be counted in measuring IBM's market share, the argument that "IBM, as the original manufacturer, indirectly controls the prices at which such machines and services can be offered . . . supports an exclusion of this competition from market definition." *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965, 980 (N.D. Cal. 1979), *aff'd*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

III.

Nor does the decision below raise any issue under Fed. R. Civ. P. 52(a) warranting consideration by this Court. The Rule 52(a) question IBM asks the Court to "settle" (Pet. 25) is merely whether reversal of the district court's market definition and "viable business opportunity" rulings was justified on the facts of this case. This is a question properly left to the court of appeals, which clearly understood the proper scope of its review.[25/]

Moreover, the "clearly erroneous" rule does not restrict court of appeals review of antitrust market definitions. This Court long ago made clear that when the district court in an antitrust case has employed an improper "construction of . . . 'reasonable interchangeability of use or the cross-elasticity of demand' in judging the facts," so as to define the product market improperly, Rule 52(a) does not restrict the appellate court's corrective authority. *United States v. Continental Can Co.*, 378 U.S. 441, 452 (1964).[26/]

[25/] The court of appeals described its role as follows (Pet. App. A8):

> To the extent that the district court's alleged errors were in formulating or applying legal principles, our review is, of course, plenary. We review the district court's findings of fact, however, under the clearly erroneous standard of review.

[26/] *Rev'g* 217 F. Supp. 761 (S.D.N.Y. 1963). *See also United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360 (1970), *rev'g* 306 F. Supp. 645 (D.N.J. 1969); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 275 & n.3 (1964), *rev'g* 214 F. Supp. 501 (N.D.N.Y. 1963); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), *rev'g* 201 F. Supp. 348 (E.D. Pa. 1962).

Finally,[27] IBM complains that in reversing on the "viable business opportunity" issue, the court of appeals did not respect alleged "credibility" determinations by the district court. Pet. 28-29.[28] But the same precedents relied upon by IBM elsewhere in its Petition (at 26-27) make clear that where "[d]ocuments or objective evidence . . . contradict the witness' story[,] . . . the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985), citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1948).

That is what the court of appeals did here, pursuant to its authority under Rule 52(a) to reverse "if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*Gypsum*, *supra*, at 395). And far from failing to consider "the record viewed in its entirety"

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[27] IBM also claims a violation of Rule 52(a) in the court of appeals' ruling (Pet. App. A25) that the evidence cited by the district court did not support a conclusion "that innovation and price reductions precluded a finding of market power." Pet. 27-28. But even on IBM's reading of the evidence, there was no showing that innovation and price reductions had diminished IBM's market power, only that they were "driven by and reflected 'strong competitive forces.'" Pet. 27 (omitting IBM's emphasis on words it added to district court quote). As the court of appeals recognized, the district court's leap to the conclusion that IBM *necessarily* must have lacked market power was simply a *non sequitur*, and the record as made did not support the district court's inference. Pet. App. A25 & n.18 ("Each case must be decided on its own facts, and facts must be found on the evidence presented.").

[28] Significantly, IBM does not seek review of any substantive issue relating to this aspect of the decision below.

(*Anderson*, *supra*, at 573), as IBM inexplicably asserts (Pet. 25), the opinion below is if anything notable for the extraordinary care and thoroughness with which the court canvassed the entire voluminous record. Nothing in its performance needs either "clarification" or "correction," IBM to the contrary notwithstanding (Pet. 30).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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